85-102

Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

****

MEN'S WEARHOUSE, INC., APPELLANT

V.

MICHAEL HELMS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

****

JURISDICTIONAL STATEMENT

JOHN F. NICHOLS & ASSOCIATES, P.C.
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440 Louisiana, Box 140
Houston, Texas 77002
Phone: (713) 227-7100

Attorneys for Appellant

Date: July 3, 1985

QUESTION PRESENTED

Whether the construction of a Texas rule of civil procedure to permit certain appellants late filing of transcriptions of the trial appealed from, while denying that permission to others similarly situated, offends the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

NO. _____

****

MEN'S WEARHOUSE, INC., APPELLANT

V.

MICHAEL HELMS, APPELLEE

****

ON APPEAL FROM THE SUPREME COURT OF TEXAS

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of Texas refusing its application for writ of error, entered on March 6, 1985, and leaving standing the judgment of the First Court of Appeals of Texas, entered December 11, 1984. Appellant submits this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The opinion of the First Court of Appeals of Texas of December 11, 1984, including the dissenting opinion of Justice Levy, is attached hereto. Also attached is the opinion of the First Court of Appeals dealing directly with the constitutional question raised herein, entered August 4, 1983; and the order of the Supreme Court of Texas refusing Appellant's application for writ of error. These documents comprise Appendix A hereto.

JURISDICTION

This Court has jurisdiction under 28 U.S.C.§ 1257(2). The Supreme Court of Texas, Texas's highest court, denied Appellant's motion for rehearing on April 10, 1985, and notice of appeal was filed in that court on April 16, 1985. The state statute involved is Texas Rule of Civil Procedure 21c, in conjunction with Texas Rule of Civil Procedure 386, Vernon's Annotated Texas Statutes, as applied. It

was drawn into question by direct challenge to its constitutionality as applied. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 441 (1979).

QUESTION PRESENTED

Whether the construction of a Texas rule of civil procedure to permit certain appellants late filing of transcriptions of the trial appealed from, while denying that permission to others similarly situated, offends the Due Process and/or Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.

STATUTES INVOLVED

Texas Rules of Civil Procedure 21c and 386, set forth in Appendix B hereto.

STATEMENT

This suit was brought by Michael Helms, Appellee herein, to recover for alleged personal injuries.

Trial was to the court and judgment was entered in Appellee's favor on March 28,

1983. Notice of appeal was timely filed to the First Court of Appeals of Texas. The clerk of the trial court was requested to prepare and file the transcript (i.e., the assembled pleadings) and timely complied. The court reporter was requested to prepare and file the statement of facts (i.e., the transcribed evidence at trial); the statement of facts was prepared timely and furnished to both parties but the court reporter neither filed it nor informed counsel for Appellant that he was not so filing it. Appellant, believing the record complete upon notice of its filing by the trial court's staff, prepared a full assignment of error and brief on the merits, which was timely filed. Upon filing the brief, Appellant discovered for the first time that the statement of facts had not been filed by the court reporter and immediately tendered it to the clerk of the court, with a motion to permit its late

filing and accompanying affidavits. Appellee did not oppose the late filing and sustained no prejudice in the event the statement of facts was filed late. A divided panel of the court of appeals denied the motion. Justice Levy, in dissent, wrote that the construction of Texas Rule of Civil Procedure 21c embraced by the court would, in his opinion, violate the Due Process and Equal Protection Clauses of the United States Constitution. Appellee filed a motion for rehearing, urging the constitutional dimensions of the construction of the procedural rule used by the majority; the motion was denied with one justice dissenting, in part on federal constitutional grounds. On December 11, 1984, the First Court of Appeals affirmed the trial court's judgment without considering the statement of facts.

Review was timely sought in the Supreme Court of Texas, based in part on the unconstitutional application of Rule 21c. The

petition was denied on March 6, 1985 and motion for rehearing also denied on April 10, 1985.

THE QUESTION IS SUBSTANTIAL

Equal access to the processes of law is embedded in the Federal Constitution as a necessary element between the citizen and his government. The right to a fair trial is a right admittedly protected by the Due Process Clause of the Fifth Amendment to the Federal Constitution. Adamson v. California, 332 U.S. 46, 53 (1947). Due process does not guarantee a right to appeal, but where that right is granted by a state it is an important right and must be exercised without discrimination. It cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. Lindsey v. Normet, 405 U.S. 66 (1972). This Court early recognized the fact that legislation which gives one class certain rights and the benefits

of certain modes of procedure while denying to one similarly situated those same rights and benefits constitutes unjust discrimination and a denial of equal protection. Backus v. Fort Street Union Depot Co., 169 U.S. 557 (1898). A classification which delineates between certain persons who enjoy rights or benefits and those who do not must be reasonable, not arbitrary, and "must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S 412, 415 (1920).

In the instant case, recent judicial interpretations of Texas Rule of Civil Procedure 21c, concerning time periods for filing portions of the appellate record, have created an invideous discrimination among litigants similarly situated. Since 1981, filing of the appellate record is no longer jurisdictional. Texas Rule of Civil

Procedure 386. This was a significant change from past procedure, designed to simplify the taking of an appeal and to avoid the harsh results often resulting from the old jurisdictional requirements. Alejandro v. Alejandro, 627 S.W.2d 205 (Tex. Civ. App. - Austin 1981). Texas courts thereafter had held that under Rule 386 they were authorized to permit the late filing of a tendered portion of the appellate record, in their discretion; a distinct departure from the harsh law previously obtaining. E.g., Wallace v. Texas Employer's Insurance Association, 624 S.W.2d 268 (Tex. Civ. App. - Dallas 1981, no writ); Exposition Apartments Co. v. Barba, 624 S.W.2d 414 (Tex. Civ. App. - Austin 1981, no writ). About a year later, the Texas Supreme Court construed Rule 386, in conjunction with Rule 21c, to preclude any late filings other than pursuant to the 15-day requirement of Rule 21c. B. D. Click v. Safari Drilling Corp., 638 S.W.2d

860 (Tex. 1982). The stated reason was:

> It must be recognized that the time limits prescribed by Rule 21c accomplish an important purpose by fixing the date a judgment becomes final. Valuable property and personal rights are fixed as of that time. If a record may be filed at any time after the cost bond is timely filed, a successful litigant will not know when the judgment becomes final.

Id. at 862. Based upon this and no other stated policy reason, the Court held that the harsh rule of 21c prevailed over the liberalizing provisions of Rule 386.

The means chosen by the rule-making authority, the Supreme Court of Texas, is not well suited to its stated purpose. Under Texas law, the trial court's judgment does not become final if a cost bond is timely filed (which was unquestionably done in the instant case); the timely filing of

the transcript (written pleadings below) insures that the appeal cannot be dismissed but must follow its normal procedural course. Oldaker v. Lock Construction Co. 528 S.W.2d 71, 75 (Tex. Civ. App. - Amarillo 1975, writ ref'd n.r.e.); Root v. Hester, 309 S.W.2d 480 (Tex. Civ. App. - Eastland 1958, writ ref'd). The denial of late filing of the statement of facts does not affect the finality of the trial court's judgment one whit, but only affects Appellant's rights to have his appeal considered on the merits. The classification of all late filers, without regard to the cause for the late filing or the effect on the finality of the trial court judgment, has no proper connection with the object of the legislation, finality of judgments. A discrimination which is made to depend on differences without a proper connection to the object of the legislation is invalid. American Sugar Refining Co. v. Louisiana, 179 U.S. 89 (1900). A valid

classification must rest on a difference bearing a fair, substantial, natural, reasonable, and just relationship to the object for which it is proposed. Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522 (1959); Hartford Steam Boiler Inspection & Insurance Co. v. Harrison, 301 U.S. 459 (1937).

Further, to avoid offending against the Equal Protection Clause of the United States Constitution, a classification must include all persons who naturally belong to the class. Mutual Loan Co. v. Martell, 222 U.S. 225 (1911); Jones v. Brim, 165 U.S. 180 (1897). Since the judicial creation of the original classification, Texas courts have carved out a subset not constrained by the literal language of Rule 21c. In Cheek v. Zalta, 669 S.W.2d 719 (Tex. 1984), the court reporter had not timely prepared the statement of facts. The appellant Cheek had timely filed a Motion to Extend the time for filing and requested an extension

until October 15, 1983, the date given in the court reporter's affidavit as being the time by which he could finish the statement of facts. The court of appeals did not rule on the motion until November 10, at which time it granted the extension only to that date. Appellee filed a motion to dismiss for want of prosecution, to which Cheek filed no response. On December 1, the court of appeals dismissed Cheek's appeal. The Texas Supreme Court found this ruling to be an abuse of discretion and reversed and remanded the cause to the court of appeals for the filing of the statement of facts and for consideration of the case on its merits. The facts in Cheek were considerably worse for the appellant than in the instant case. In Cheek, the court of appeals had granted all relief which had been requested by the appellant. The appellant had not even filed a second motion to extend, either timely or tardy,

and had offered no contest to the appellee's motion to dismiss for want of prosecution. The distinction between an appellant who files late in the first instance and one who files timely first and then is late in the second instance, or never files a second motion at all, is one without any logical relationship whatsoever to the stated purpose of Rule 21c. In the handful of cases which have been reported since Cheek, a late request has been considered outside the application of Rule 21c if it is a second or third request. David McDavid Pontiac, Inc. v. Nix, 665 S.W.2d 133 (Tex. Civ. App. - Dallas 1983); Gibralter Savings Association v. Hamilton Airmart, Inc., 662 S.W.2d 632 (Tex. Civ. App. - Dallas 1983).

The original classification was not reasonable. A procedural classification based on an intrinsic difference is not necessarily justified. There must be a relationship between the difference in

classification and the difference in the rule of practice involved. Board of Education v. Alliance Assurance Co., 159 F. 994 (Calif. Cir. 1908). The original classification was overinclusive, in that it was not restricted to those late filers who sought to file both transcript and statment of fact (the literal reading of Rule 386). An appellant who failed to file both of these instruments timely would be subject to a motion to dismiss. An appellant who failed to file the transcript timely would be subject to a motion to dismiss. An appellant who fails to file the statement of facts timely is not subject to dismissal and the appeal pursues its normal course, with judgment becoming final no sooner and no later as a result. Even assuming arguendo that the initial classification was valid, it would be underinclusive as construed by the Texas courts in that it now no longer contains late filers of either or both instruments

who filed one timely motion to extend the deadline.

A litigant's procedural defaults in state proceedings do not prevent a vindication of his federal rights unless the state's insistence on compliance with the procedural rules serves a legitimate state interest and, in every case, inquiry must be made as to whether enforcement of a procedural forfeiture serves such a state interest. Even where the rule serves the purpose but that purpose is substantially served by other acts of the petitioners, the state's interest is not frustrated. Henry v. Mississippi, 379 U.S. 443 (1965). In the instant case, "enforcement of the rule . . . would serve no substantial state interest [and] settled principals would preclude treating the state ground as adequate . . ." Id. at 449.

A case similar in many respects to the instant case is Parrot v. Tallahassee, 381

U.S. 129 (1965). In Parrot, a state appellate court had dismissed a timely petition for certification because the petitioners, through misunderstanding or oversight, had failed to obtain certification of the record of the court below. This Court noted petitioners had tried to correct the defect when notified and that under state law that defect was not jurisdictional. In the instant case, similarly, through the oversight of an official of the court, the original statement of facts was not timely filed; Appellant tried to correct the defect immediately upon notification; no prejudice resulted to the other side; and under state law the defect was not jurisdictional. The right to equal access to modes of procedure and the equal protection of law is a right as fundamental and important as any other in a free society. Although the states may surround the right to appeal with reasonable conditions, those conditions cannot be capricious, arbitrary,

or unequal.

It is submitted that the Texas procedural rule, as applied, consitutes a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution of the United States; and that the question presented by this appeal is substantial and of public importance.

JOHN F. NICHOLS & ASSOCIATES, P.C.

BY:_____

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Attorneys for Men's Wearhouse, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Jurisdictional Statement was mailed to Howard L. Nations, 3000 Post Oak Blvd., Suite 1400, Houston, Texas 77056 on July 3, 1985.

JOHN F. NICHOLS

APPENDIX A

MAJORITY AND DISSENTING ORDER ENTERED
AND FILED AUGUST 4, 1983

COURT OF APPEALS

FIRST SUPREME JUDICIAL DISTRICT

MEN'S WEARHOUSE, INC. APPELLANT

No. 01-83-0331-CV VS.

MICHAEL HELMS, APPELLEE

On Appeal from the 333rd District Court
of Harris County, Texas
Trial Court Cause No. 79-18476

O R D E R

M A J O R I T Y

This is an appeal from a judgment awarding actual and exemplary damages in an action for false imprisonment and assault and battery.

The judgment was signed March 28, 1983. No motion for new trial was filed. In this instance, Rule 386, Tex. R. Civ. Pro. Ann., required that the transcript and statement of facts be filed within 60 days of the date judgment was signed, or by May 27, 1983. The transcript was timely filed May 23.

Under Rule 21c, the last date for filing a motion to extend time to file of the statement of facts was June 13, 1983. Here, the motion to extend time was not filed until June 22, 1983.

In B.D. Click Co., Inc., v. Safari Drilling Corp., 638 S.W.2d 860 (Tex. 1982), the Supreme Court held that the Court of Appeals did not have authority to consider a motion to extend time to file the transcript and statement of facts which was filed after the Rule 21c time limit had expired. The appellant in the case at bar contends that the holding in B.D. Click is not applicable because, in this case, the transcript was timely filed.

The rationale underlying the Click decision was a strict interpretation of the Rules of Civil Procedure. (Rules 386 and 21c) Rule 21c speaks about extensions of time for filing several appellate instruments, listed in the disjunctive. Therefore, the rule is applicable whether the

party is seeking an extension of time to file the transcript, or statement of facts, or both (as in Click).

Further, neither Rule 404, 428 or 429 provides a means for late filing of the statement of facts without a timely Rule 21c motion.

In B.D. Click Co., Inc., v. Safari Drilling Corp., 625 S.W.2d 364, 367 (Tex. Civ. App. - Eastland 1981), affm'd, 638 S.W.2d 860 (Tex. 1982), the Court of Civil Appeals held that the fifteen-day Rule 21c time limit is mandatory, and the failure to timely file a Rule 21c motion is "not such a defect as to be one of the 'informalities in the manner of bringing a case into court' that may be waived under" Rule 404.

Further, both Rules 428 and 429 have been interpreted only to permit supplementation of an existing, filed statement of facts. See Carr v. Central Music Co., 494 S.W.2d 280 (Tex. Civ. App. - Austin 1973, no writ); City of Wichita Falls v. State ex

rel. Vogtsberger, 526 S.W.2d 618 (Tex. Civ. App. - Fort Worth 1975), rev'd on other grounds, 533 S.W.2d 927 (Tex. 1976).

Accordingly, the motion to permit late filing of the statement of facts is denied.

/s/ Frank Evans
Frank G. Evans
Chief Justice

Associate Justices Bullock and Levy also participating.

Justice Levy dissents.

No publication. Tex. R. Civ. Pro. 452.

COURT OF APPEALS

FIRST SUPREME JUDICIAL DISTRICT

MEN'S WEARHOUSE, INC. APPELLANT

No. 01-83-0331-CV VS.

MICHAEL HELMS, APPELLEE

On Appeal from the 333rd District Court
of Harris County, Texas
Trial Court Cause No. 79-18476

D I S S E N T

I respectfully, but vigorously, dissent.

I would grant Appellant's Motion to File the Statment of Facts Late because the application of Rule 21c in this instance is so harsh as to offend constitutional requirements of procedural fairness.

There is no issue here of conscious indifference to the pertinent procedural rules. It is undisputed that the transcript was timely filed and the statement of facts was prepared and distributed before the May 27th deadline. Appellee can show no harm because he received a copy of the statement

of facts in April, and no delay in the appellate process whatsoever occurred. Implicit in the B. D. Click Co. case, I think, is the notion that failure to follow the 15-day limit of Rule 21c must be due to inexcusable negligence, which is manifestly not the case here.

"Due process" represents a living, dynamic principle. It is "not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due Process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in issuing fundamental justice, it is also a living principle not confined to past instances." Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 173-4 (1951) (concurring opinion).

Because the perfunctory application of Rule 21c would have a castastrophic, and

undeserved, effect upon appellant, I would hold that such application violates not only the Due Process Clause of the 14th Amendment to the federal Constitution, but also the Due Course Clause of Art. 1, §19 of our Texas Constitution.

All rules shall be given a liberal construction, pursuant to Rule 1, to attain the transcendent objective of obtaining a "just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law." This objective, in my view, is not compatible with the majority's application of Rule 21c to the appellant herein.

/s/ Ben Levy
Ben G. Levy
Associate Justice

COPY OF JUDGMENT

MEN'S WEARHOUSE		Appeal from 333rd District Court of Harris County. (Tr. Ct. #79-18476). Opinion delivered by Associate Justice Levy, Justices Doyle and Duggan sitting.
NO. 01-83-0331-CV	VS.	
MICHAEL HELMS		

The cause heard today by the Court is an appeal from the judgment rendered and entered by the court below on March 28, 1983. After hearing the cause on the transcript of the record and inspecting the same, it is the opinion of this Court that there was no error in the judgment. It is therefore considered, adjudged and ordered that the judgment of the court below in all things affirmed.

It is further ordered that the appellee, Michael Helms, do have and recover of and from the appellant, Men's Wearhouse, and its surety, Fidelity and Deposit Co. of Maryland, jointly and severally, the sum or sums adjudged to it together with the legal rate of interest from the date of the trial

court judgment, until paid, and all its costs incurred, both in this Court and in the court below.

It is further ordered that this decision be certified below for observance.

Judgement rendered by panel consisting of Justices Doyle, Duggan and Levy.

Court of Appeals

First Supreme Judicial District

OPINION

MEN'S WEARHOUSE, APPELLANT

NO. 01-83-0331-CV VS.

MICHAEL HELMS, APPELLEE

On Appeal from the 333rd District Court
of Harris County, Texas
Trial Court Cause No. 79-18476

MAJORITY OPINION

This appeal arises from a judgment in favor of appellee on theories of assault, battery, and false imprisonment. In prosecuting its appeal from a bench trial, appellant failed to timely file a statement of facts. Tex. R.Civ. P. 386. A motion requesting leave for late filing was filed with this court and overruled, and a motion for rehearing was denied. See B.D. Click Co. V. Safari Drilling Corp, 638 S.W.2d 860 (Tex. 1982). The Texas Supreme Court dismissed the Men's Wearhouse appeal on

this point for lack of jurisdiction. 27 Tex. Sup. Ct.J. 264 (March 10, 1984) (unpublished).

The case thus presents itself for our review without a statement of facts. However, findings of fact and conclusions of law, which were not objected to by the defendant, were made by the trial court as follows:

FINDINGS OF FACT

1. On or about November 14, 1977, Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed, and/or ratified the following acts:

   (a) the willful detention of [plaintiff] Michael Helms;
   (b) such detention being without the Plaintiff's consent;
   (c) such detention being without authority of law.

2. Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed and/or ratified conduct which resulted in personal injury to Michael Helms and which proximately caused Michael Helms to suffer mental anguish, humiliation, shame, fright, embarrassment, depression and physical pain.

3. Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed and/or ratified conduct which was reckless, willful, malicious and in wanton disregard of Michael Helm's rights in injuring him.

4. Defendant intentionally or knowingly caused physical contact with Plaintiff when defendant knew or should have reasonably believed the Plaintiff would regard the contact as offensive or provocative.

CONCLUSIONS OF LAW

1. Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed and/or ratified conduct which constituted an assault and battery on Michael Helms and caused actual damages in the amount of Five Thousand dollars ($5,000.00).

2. Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed and/or ratified the false imprisonment of Michael Helms causing actual damages to him in the amount of Fifteen Thousand dollars ($15,000.00).

3. Defendant, its vice-principal, agents, servants and employees participated in, authorized, directed and/or ratified reckless, willful, malicious conduct in wanton disregard of Michael Helms rights for which Defendant should pay Plaintiff the sum of Forty Thousand dollars ($40,000.00) in exemplary damages.

Since no statement of facts was brought forward, the trial court's findings are conclusive, and it must be presumed that the evidence was sufficient to support such findings. Mullins v. Main Bank & Trust, 592 W.W.2d 24, 25 (Tex. Civ. App.--Beaumont 1979, no writ); David A. Carl Enterprises, Inc. v. Crow-Shutt #14, 553 S.W.2d 118, 120 (Tex. Civ. App--Houston [1st Dist.] 1977, no writ); Vanity Fair Properties v. Billingsley, 469 S.W. 2d 453, 454 (Tex. Civ. App.--San Antonio 1971, writ ref'd n.r.e) and cases cited therin. Rule 419 of the Texas Rules of Civil Procedure provides, "any statement made by appellant in his original brief as to the facts or the record may be accepted by the court as correct unless challenged by opposing party." See White v. Corpus Christi Little Misses Kick. Ass'n, 526 S.W.2d 766 (Tex. Civ. App.--Corpus Christi 1975, no writ). However, when the trial court has filed specific findings of fact that are suffi-

cient to support its judgment, the rule should not be invoked to avoid the binding effect of such findings. David A. Carl Enterprises, Inc., supra. Thus, we decline to apply rule 419 in the instant case.

Appellant brings 19 points of error. Of these, 15 expressly relate to the state of the evidence presented at trial, alleging variously the absence or insufficiency of the evidence to support elements of appellee's case or the conclusiveness of the evidence in defense of the alleged offending conduct. There being no statement of fact in the record, we must presume there was evidence to support the findings of fact and the court's judgment. Mays v. Pierce, 281 S.W.2d 79,82 (Tex. 1955).

The remaining four points of error, numbers 13, 15, 17, and 19 allege that the court's damage awards were either excessive or an abuse discretion. The remaining four points are also determined by this rule because it was not against the great weight

and preponderance of the evidence. We conclude that the judgment of the trial court is supported by the record. The judgment is affirmed.

/s/ HENRY E. DOYLE
HENRY E. DOYLE
ASSOCIATE JUSTICE

Justices Duggan and Levy also sitting.
Justice Levy dissenting in part.

For Publication.

MENS.SH

COURT OF APPEALS

First Supreme Judicial District

OPINION

MEN'S WEARHOUSE, APPELLANT

NO. 01-83-0331-CV VS.

MICHAEL HELMS, APPELLEE

On Appeal from the 333rd District Court
of Harris County, Texas
Trial Court Cause No. 79-18476

DISSENTING OPINION

I adhere to the view expressed in my earlier dissent, being somewhat appalled by the procedural disaster generated by the majority's perfunctory application of Rule 21c, Tex. R. Civ. P. Ann.

By denying appellant's motion to permit a late filing of the statement of facts, despite the mitigating facts that:

(a) The transcript was timely filed;

(b) the statement of facts was timely prepared and distributed to the opposing counsel;

(c) appellee did not plead, nor could he show, any harm resulting from he appellant's oversight in not

timely filing the statement of fcts, because he received a copy therof well before the May 27th deadline;

(d) no delay in the appellate process whatsoever occurred;

the majority compels the conclusiveness of the trial court's findings; forces the presumption that the evidence was sufficient to support such findings; and effectively ignores adjudication of appellant's nineteen points of error, most of which were evidentiary questions.

In this triumph of form over substance, the majority succeeds in nullifying the teaching of Cheek v. Zalta, 669 S.W.2d 719 (Tex. 1984), in which a similar situation induced the Supreme Court to remand the cause to the Court of Appeals "to allow the filing of the statement of facts and briefs and for consideration of the merits."

Nor can I agree with the majority's unsupported holding that we are not entitled to consider uncontested assertions contained in the parties' briefs as a substitute

statement of facts, pursuant to Tex. R. Civ. P. 419. See Sarris v. Christi, 217 S.W.2d 99, 101 (Tex. Civ. App--Dallas 1949, writ ref'd n.r.e.), which holds:

> The factual background of the suit, other than applicable summary conclusions of law, is not controverted or challenged in briefs of the parties, accepted [sic] as correct; thus in absence of a statement of facts on this appeal, the required statement in briefs, Rule 419, Vernon's Texas Rules of Civil Procedure, as to the facts upon which the judgment appealed from was based, are adopted in lieu of statement of facts.

Our Rule 1 of the Texas Rules of Civil Procedure was assigned its preferred, and in fact primary, position to indicate decisively that all subsequent rules shall be given a liberal construction in order to obain a "just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law."

By blindly applying Rule 21c, we are depriving appllant of his right to an

adjudication on the merits and thus this fundamental right to procedural fairness. This constitutes a violation, as I said in my earlier dissent, of the Due Process Clause of the 14th Amendment, "perhaps the most majestic concept in our whole constitutional system." 1 Its operation in this case compels conclusions and presumptions that, in effect, deprive this Court of the opportunity to affirm the fairness of the trial.

For these reasons, I respectfully dissent.

/s/ BEN G. LEVY
BEN G. LEVY
Associate Justice

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1. Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 173-4 (1951) (concurring opinion).

AFFIRM WITH ASSOCIATE JUSTICE BEN G. LEVY DISSENTING AND MAJORITY AND DISSENTING OPINIONS FILED DECEMBER 11, 1984.

TRUE COPY ATTEST:

/s/ Kathryn Cox

Kathryn Cox
Clerk of the Court

COURT OF APPEALS
FIRST SUPREME JUDICIAL DISTRICT OF TEXAS
1307 SAN JACINTO, 10TH FLOOR
HOUSTON, TEXAS &7002

ORDER

Men's Wearhouse, Inc. COURT OF APPEALS
Appellant NO. 01-83-00331-CV

VS.

Michael Helms
Appellee

On this 31st day of December 1984 came on to be considered Appellants' Motion for Rehearing and Request for Oral Argument

AND SUCH MOTION IS HEREBY OVERRULED

PER CURIAM

Panel consisting of Justices Justices Doyle and Duggan with Justice Levy Dissenting

A true copy attest:

KATHYRN COX
FIRST COURT OF APPEALS

BY /s/
Chief Deputy

Hon. John F. Nichols
Nichols & Murray
1550 Bank of the Southwest Bldg.
Houston, Texas 77002

Hon. Lawrence Sauer
4803 Montrose, Suite 11
Houston, Texas 77006

Hon. Howard L. Nations
3000 Post Oak Blvd. Suite 1400
Houston, Texas 77056

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, TExas 78711
Mary M. Wakefield, Clerk

March 6, 1985

Mr. John F. Nichols
1550 Bank of Southwest Bldg.
Houston, Texas 77002

Mr. Howard L. Nations
3000 Post Oak Blvd.
Suite 1400
Houston, TExas 77056

RE: Case No. C-3818

STYLE: MEN'S WEARHOUSE (SEE C-2650)
v. MICHAEL HELMS

Dear Counsel:

Today, the Supreme Court of Texas refused the above referenced application for writ of error with the notation, No Reversible Error.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/
Deputy

NO. C-2650

IN THE SUPREME COURT

OF TEXAS

MEN'S WEARHOUSE, INC., Petitioner

VS.

MICHAEL HELMS, Respondent

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Men's Wearhouse, the Petitioner above-named, hereby appeals to the Supreme Court of the United States from the final judgment of this Court, overruling its Motion for Rehearing of its Application for Writ of Error in this case, entered on April 10, 1985.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

JOHN F. NICHOLS & ASSOCIATES, P.C.

BY: _____

JOHN F. NICHOLS
SBT#14996000
1550 Bank of Southwest Bldg.
Houston, Texas 77002
Phone: (713) 651-1550

Attorneys for Men's Wearhouse

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Appeal to the Supreme Court of the United States was sent by Certified Mail, Return Receipt Requested, to Howard L. Nations, 3000 Post Oak Blvd., Suite 1400, Houston, Texas 77056 and to Kathryn Cox, Clerk, Court of Appeals, 1st Supreme Judicial District, 1307 San Jacinto, 10th Floor, Houston, Texas 77002, on April 16, 1985.

_____

JOHN F. NICHOLS

SUPREME COURT OF TEXAS
P. O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

April 10, 1985

Mr. John F. Nichols
1550 Bank of the Southwest Bldg.
Houston TX 77002

Mr. Howard L. Nations
3000 Post Oak Blvd.
Suite 1400
Houston TX 77056

RE: Case No. C-3818

STYLE: MEN'S WEARHOUSE (SEE C-2650)
v. MICHAEL HELMS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

Mary M. Wakefield, Clerk

By /s/
Deputy

APPENDIX B

Rule 21c. Extensions of Time on Appeal

(1) An extension of time may be granted for late filing in a court of civil appeals of a transcript, statement of facts, motion for rehearing, or application to the supreme court for writ of error, if a motion reasonably explaining the need therefor is filed within fifteen (15) days of the last date for filing as prescribed by the applicable rule or rules.

(2) A motion for late filing of an application for writ of error shall be filed in, directed to and acted upon by the supreme court. A copy of the motion shall be filed at the same time in the court of civil appeals, and the clerk of the supreme court shall notify the court of civil appeals of the action taken on the motion by the supreme court.

Motions for late filing of the other instruments designated herein shall be filed in, directed to and acted upon by the court of civil appeals in which the cause is pending. Any order of the court of civil appeals granting or denying a motion for late filing of any such instruments shall be reviewable by the supreme court for arbitrary action or abuse of discretion.

Rule 386. Time to File Transcript and Statement of Facts

The transcript and statement of facts, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, within one hundred days after the judgment is signed, subject to the provisions of Rule 428. If a writ of error has bee perfected, the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. [The court shall have no authoriity to consider a late filed transcript or statment of facts, except as permitted by Rule 21c.] [Bracketed portion added April 1, 1984, and not applicable to this case.]

Supreme Court, U.S.
FILED
AUG 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

NO. 85-102

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MEN'S WEARHOUSE, INC., APPELLANT

V.

MICHAEL HELMS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO AFFIRM OR IN THE ALTERNATIVE MOTION TO DISMISS

HOWARD L. NATIONS
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NO. 85-102

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

MEN'S WEARHOUSE, INC., APPELLANT

V.

MICHAEL HELMS, APPELLEE

ON APPEAL FROM THE SUPREME COURT OF TEXAS

MOTION TO AFFIRM OR IN THE ALTERNATIVE MOTION TO DISMISS

OBJECTIVE OF MOTION

Appellee, Michael Helms, seeks affirmance of the judgment of the Supreme Court of Texas because the issues raised on appeal in the state court were regarding the interpretation of the Texas Rules of Civil Procedure and were thoroughly exhausted by the state appellate courts. The issues presented are not substantial for review by the United States Supreme Court, and therefore do not need further argument. In the alternative, Appellee moves this Honorable Court to dismiss the

appeal by Men's Wearhouse, Appellant, because the jurisdictional prerequisite has not been met requiring the state statute to be repugnant to the Constitution of the United States. Appellant invokes jurisdiction pursuant to 28 U.S.C. § 1257(2). Appellant purports to be within the strictures of § 1257(2) by alleging that a Constitutional question is raised by the interpretation of a Texas Rule of Civil Procedure. Appellant has failed to meet this burden in showing that the Texas Rule of Civil Procedure in question raises a Constitutional issue, and therefore, the United States Supreme Court is without jurisdiction.

FACTS ON WHICH MOTION IS BASED

This is a suit for damages arising out of an assault and battery and false imprisonment of Appellee, Michael Helms, by the Men's Wearhouse, Appellant. Suit was maintained in the District Court of Harris County, Texas. Trial was to the court, without a jury, and after consideration of the evidence, the

trial judge entered judgment for Appellee, Michael Helms. The trial court filed findings of fact and conclusions of law in support of its judgment.

Appellant, Men's Wearhouse, prosecuted an appeal from the judgment of the trial court, but did not properly and timely file the statement of facts for review by the Court of Appeals of Texas. Additionally, Appellant, Men's Wearhouse, did not request an extension of time as provided by Texas Rule of Civil Procedure 21c. Appellant, Men's Wearhouse, filed a Motion to File Statement of Facts Late in the Court of Appeals of Texas which was denied. This Motion was not provided for in the Texas Rules of Civil Procedure, because Appellant failed to timely avail itself of late filing pursuant to Rule 21c. The Court of Civil Appeals of Texas, therefore, properly denied the Motion. On December 11, 1984, the First Court of Appeals of Houston, Texas affirmed the trial court's judgment. Appellant then sought an Applica-

tion for Writ of Error in the Supreme Court of Texas which raised the issue of the Court of Appeals disallowing the late filing of the statement of facts. The Supreme Court of Texas refused the Application for Writ of Error on March 6, 1985 and found that there was no reversible error committed by the Court of Appeals of Texas. Appellant's Motion for Rehearing was denied on April 10, 1985.

Appellee, Michael Helms, takes exception to the facts presented by Appellant, Men's Wearhouse. In Appellant's statement of the facts, several times Appellant referred to the court reporter failing to file the statement of facts as requested by Appellant. These references are misleading because the responsibility of the filing of the statement of facts falls on the attorney and not the court reporter. The court reporter may be requested by the attorney to prepare the statement of facts but the ultimate filing of the statement of facts is the responsibility of

the attorney and cannot be delegated. Texas Rule of Civil Procedure 386 (Appendix A). The Rules of Civil Procedure are directed to the attorney, and Rule 386 does not provide that it is the court reporter's responsibility to file the statement of facts.

ARGUMENT

Texas Rule of Civil Procedure 386 permits a late filing of the statement of facts only pursuant to a timely Rule 21c motion. The last sentence in Rule 386 expressly states:

> The court shall have no authority to consider a late filed transcript or statement of facts, except as permitted by Rule 21c.

Texas Rule 386 provides a timetable for the filing of transcripts and statement of facts. As expressly stated by the rule, the only way to file a statement of facts late, is by filing a timely Rule 21c motion which reasonably explains the reason for the late filing of the statement of facts. Such motion, as provided by Rule 21c, must be filed within fifteen days of the last date

for filing of the statement of facts. Appellant, Men's Wearhouse, did not timely file the statement of facts, nor did Appellant timely file a Motion for Extension pursuant to Rule 21c. As a result, the Court of Appeals and the Supreme Court of Texas both denied Men's Wearhouse to file any such statement of facts beyond the time provided for filing in the Texas Rules of Civil Procedure.

The relevant Texas law construing the filing of the statement of facts is controlled by B. D. Click Co. v. Safari Drilling Corp., 630 S.W.2d 860 (Tex. 1982). The Click decision was the Texas Supreme Court's definitive answer to the problems arising from late filing of the transcript or statement of facts. The language in the Click decision is unequivocal and the Texas court held that:

> An Appellant's motion for extension of time to file the transcript and statement of facts must be filed within fifteen days of the last date for filing as prescribed by Rule 21c. Click at 862.

This decision was intended to put an end to any confusion concerning when the court's authority to consider a statement of facts and transcript ceased. The intention of the Supreme Court is plain and clear from the Click decision, but they went a step further and put the verbage of the decision into the Texas Rule itself. Texas Rule 386 in essence mirrors the Click decision, and in fact was changed by amendment effective April 1, 1984 which embodies the following language in a footnote to the rule:

> The last sentence has been added and the provision that late filing shall not affect the court's authority has been deleted to conform to B. D. Click Co. v. Safari Drilling Corp., 638 S.W.2d 860 (Tex. 1982).

The footnote to Rule 386 shows a clear intention to eradicate any confusion about the late filing of statement of facts.

Appellant, Men's Wearhouse, has alleged jurisdiction under 28 U.S.C. § 1257(2), by seeking to illustrate disparate treatment by the application of Texas Rule of Civil Procedure 21c which would be violative of due process and equal protection provisions of the United States Consti-

tution. Appellant seeks to do this by showing that there are two classes of individuals for the purpose of late filing of statement of facts by relying on the Texas Supreme Court case of Cheek v. Zalta, 669 S.W.2d 719 (Tex. 1984).

This case is clearly distinguishable from the case at bar. The court reporter in the Cheek case failed to prepare the statement of facts because the court reporter had not physically transcribed nor prepared the statement of facts. The Cheek case involves the Texas Court of Appeals dismissal of Ralph Cheek's appeal of a trial court judgment for failure to file a statement of facts. In this case, Cheek timely filed a Rule 21c Motion for Extension to File the Statement of Facts on September 20, 1983. The extension was to run until October 15, 1983. However, October 15 passed and the Court of Appeals had not yet ruled on Cheek's motion. On November 10, 1983, the Court of Appeals granted the motion but only until October 15,

1983. When the court granted the motion which extended the time to October 15, that date had already passed.

The granting of the motion operated nunc pro tunc to October 15, which prevented Cheek from filing a second Motion for Extension within the fifteen day time period prescribed by Rule 21c. It is important to note, that on November 10, 1983, the date the Court of Appeals granted the motion, the court reporter still had not completed the preparation of the statement of facts. This has nothing to do with the filing of facts, but rather with the physical preparation of the statement of facts. The failure of the court reporter to prepare the statement of facts was through no fault of the Appellant Cheek. Cheek had timely filed a motion for extension pursuant to the rules and had in fact complied with the Texas Rules of Civil Procedure completely.

The Texas Supreme Court decided that it was abuse of discretion to dismiss an appeal

for failure to file the statement of facts, if the failure was not the fault of the Appellant. In this case, the failure for Cheek to timely file the statement of facts had nothing to do with Cheek's actions, but rather because the court reporter had not actually prepared the statement of facts. Since no statement of facts was prepared, there was no way possible for Cheek to file something that did not exist. Bear in mind, that it is the court reporter's responsibility to prepare the statement of facts, but it is not the court reporter's responsibility to plied with the Texas Rules of Civil Procedure completely.

The Texas Supreme Court in Cheek decided that it was abuse of discretion to dismiss an appeal for failure to file the statement of facts, if the failure was not the fault of the Appellant. In this case, the failure for Cheek to timely file the statement of facts had nothing to do with Cheek's actions, but rather because the court reporter had not

prepared the statement of facts. Since no statement of facts was prepared, there was no way possible for Cheek to file something that did not exist. Bear in mind that it is the court reporter's responsibility to prepare the statement of facts, but it is not the court reporter's responsibility to actually file such statement of facts. The Texas Supreme Court ruled that Cheek should have a second opportunity to file a Rule 21c extension to enable Cheek to timely file the statement of facts.

Cheek v. Zalta is distinguishable from the case at bar in at least two major aspects. First, in Cheek, the court reporter had failed to timely complete the statement of facts. This failure had nothing to do with Cheek and was not related to any fault of his.

Secondly, the case is distinguishable because in Cheek, there was a timely filing of a Rule 21c motion to extend time. In the present case, there was no such timely filing

of a Rule 21c motion. Therefore, the Texas Supreme Court correctly held in the present case that it did not have authority to consider a motion to extend which was filed after the time limits provided in Rule 21c.

These two distinguishing factors make the Cheek are inapplicable to the case at bar, and does not create a disparity in the application of the Texas Rules of Civil Procedure. Appellant has alleged that there is a distinction between groups of litigants who file late which was created by the exception in Cheek. The two purported classifications are the litigants which are controlled by the Cheek decision and those who are controlled by the Click decision. The present case would fall into the latter category. The difference in the alleged classifications is in the allowance of late filing of the statement of facts. This is a total misinterpretation of these decisions. The Cheek case and the Click case, controlling the case at bar, apply to two clearly distinguishable

situations and are not related. There is not a creation of a classification of individuals which has been unfairly treated pursuant to the United States Constitution and it's protections of due process and equal protection.

In order to apply the traditional equal protection analysis employed in Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920) and later stated in Reed v. Reed, 404 U.S. 71 (1971), there must be a classification in question in which there has been a dissimilar treatment. Reed at 76. In the case at bar, there is no classification created since there is no disparate treatment of litigants. Appellant has attempted to compare two situations which are not comparable, and are in fact totally dissimilar. Discussion and analysis of due process and equal protection need never be reached because the threshold requisite of a classification involving dissimilar treatment is not met. The interpretation of the Texas Rules of Civil Procedure 386 and 21c by the Texas Supreme Court

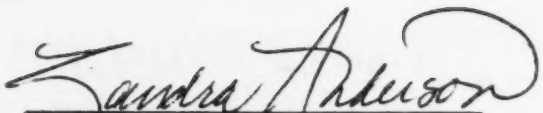
presents no Constitutional violation, and as such, Appellant, Men's Wearhouse, has failed to satisfy the jurisdictional requirement pursuant to 28 U.S.C. § 1257(2).

It is respectfully submitted that the interpretation of the Texas Rules of Civil Procedure 386 and 21c by the Texas Supreme Court was not violative of the Constitution of the United States. It is further urged that Appellant, Men's Wearhouse, has not stated jurisdiction pursuant to 28 U.S.C. § 1257(2), and for this reason Appellee, Michael Helms, urges that this Honorable Court grant his Motion to Affirm Or In The Alternative Motion to Dismiss.

Respectfully submitted,

Howard L. Nations
HOWARD L. NATIONS
3000 Post Oak Boulevard
Suite 1400
Houston, Texas 77056
(713) 960-9690

Attorney of Record
for Appellee



ZANDRA ANDERSON
3000 Post Oak Boulevard
Suite 1400
Houston, Texas 77056
(713) 960-9690

Attorney for Appellee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct coy of the foregoing Motion to Affirm or in the Alternative Motion to Dismiss was mailed Certified Mail, Return Receipt Requested on the 1st day of Aug., 1985, to Mr. John F. Nichols, 1440 Lyric Centre Building, 440 Louisiana, Box 140, Houston, Texas 77002.

Howard L. Nations
HOWARD L. NATIONS

APPENDIX A

Rule 386. Time to File Transcript and Statement of Facts

The transcript and statement of fats, if any, shall be filed in the appellate court within sixty days after the judgment is signed, or, if a timely motion for new trial or to modify the judgment has been filed by any party, within one hundred days after the judgment is signed, subject to the provisions of Rule 428. If a writ of error has been perfected, the record shall be filed within sixty days after perfection of the writ of error. Failure to file either the transcript or the statement of facts within such time shall not affect the jurisdiction of the court, but shall be ground for dismissing the appeal, affirming the judgment appealed from, disregarding materials filed, or applying presumptions against the appellant, either on appeal or on the court's own motion, as the court shall determine. [The court shall have no authority to consider a late filed transcript or statement of facts, except as permitted by Rule 21c.] [Bracketed portion added April 1, 1984, and not applicable to this case.]

Rule 21c. Extensions of Time on Appeal

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